IN THE

Supreme Court of the United States

NO. 76-738

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

CECIL MARTIN,
Respondent

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

JERRY BRIGMON,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Louisiana & Arkansas Railway Company, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 23, 1976.

OPINION BELOW

The opinion of the Court of Appeals, ____ F.2d ____, (5th Cir., 1971), Slip Opinion July 23, 1976, at P. 4618, appears in the Appendix hereto. The Findings of Fact and Conclusions of Law, the Judgment of the United States District Court for the Eastern District of Texas, Beaumont Division, and of the Court of Appeals denial on Petition for Rehearing and Petition for Rehearing En Banc also appear in the Appendix hereto. They are not reported.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit, affirming the District Court's Judgment, was entered on July 23, 1976. The Petition for Rehearing and Petition for Rehearing En Banc was denied by Order of the Court of Civil Appeals for the Fifth Circuit entered on September 24, 1976. The Petition for Certiorari was filed within ninety days (90) days of that date. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in basing its decision to affirm upon the assumption that the trial Court would exercise its discretion to find pendent jurisdiction if the case were reversed and remanded, when it is apparent from the Findings of Fact and Conclusions of Law that the Court below never considered pendent jurisdiction to be involved in the case.

2. Did the Court of Appeals err in holding, *ab initio*, without the trial Courts ever having exercised its discretion, that there was pendent jurisdiction to hear a state Court claim when the record below indicates, under the decisions of this Honorable Court, that as a matter of law there was no substance to the alleged Federal Court claim.

STATUTORY PROVISIONS

Title 45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such com-

merce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Title 28 U.S.C. § 1332. Diversity of citizenship; amount in controversy, costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and cost, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be

deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

STATEMENT OF THE CASE

Plaintiffs Martin and Brigmon originally filed separate actions for personal injuries they had received while unloading railroad cars delivered by Petitioner, Defendant below, to the premises of International Paper Company, the employer of the Plaintiffs-Respondents, in Cullen, Louisiana. The injuries were not related and did not happen the same day, but the causes were consolidated since they raised identical legal issues. The case was tried non-jury in the United States District Court for the Eastern District of Texas, Beaumont Division. In their pleadings, the Plaintiffs-Respondents alleged that their relationship to the railroad was such as to bring them within the purview of the FELA, and, in the alternative, ask for damages under the common law of Louisiana for negligence. The pleadings in both cases are substantially identical. The only allegation of diversity jurisdiction contained in the pleadings of the Plaintiffs-Respondents, was as follows:

> "The citizenship of the Plaintiff and Defendants is completely diverse, and the amount in controversy, exclusive of interest and costs, exceeds the sum of

TEN THOUSAND AND 00/100 DOLLARS ($10.-000.00), and this Court has exclusive jurisdiction and venue hereof."

In the Pre-Trial Order entered in the case under the subsection *"JURISDICTION"*, appears the following:

"Jurisdiction is denied by Defendant, and jurisdiction is an issue."

The case was tried solely and exclusively on the FELA claims because, as the Court of Appeals below correctly said in its opinion, at page 4620 of the Slip Opinion:

"At the time of trial, all parties considered the state cause of action to be barred by the one year Louisiana prescriptive statute."

The lower Court did nothing for sixteen (16) months after the trial. Plaintiffs-Respondents withdrew their proposed Findings and Conclusions based on the FELA claim and submitted new proposed Findings and Conclusions based solely on the state law negligence claims. Apparently persuaded that the law of the forum, Texas, applied, under the holding in *Culpepper v. Daniel Industries,* 500 S.W.2d 958 (Tex. Civ. App. 1973), the Court proceeded in their Findings of Fact and Conclusions of Law solely and exclusively upon the Louisiana law negligence issues and did not enter any Findings or Conclusions with respect to the FELA action. In Findings of Fact 1 and 2, however, the lower Court did find specifically that the Plaintiffs-Respondents were employed by International Paper Company, and by inference, not by the railroad. There were no fact findings with respect to jurisdiction. In Conclusion of Law 4, the Court found:

"This Court has jurisdiction by reason of the fact that there is diversity of citizenship, and the amount in controversy exceeds TEN THOUSAND AND 00/100 DOLLARS ($10,000.00)."

There are no Findings of Fact, nor mention anywhere in the record in the lower Court of pendent jurisdiction, no findings with respect to the substantiality of the Federal claim, or any other indication that the Court ever considered the question of pendent jurisdiction. Substantial money judgments were entered for the Plaintiffs based upon Court's Findings of Fact and Conclusions of Law, and appeal was had to the Court of Appeals for the Fifth Circuit. The question of jurisdiction was raised in the Court of Civil Appeals, principally on the ground that there were no pleadings nor proof to support diversity jurisdiction in the lower Court and that since the case had been decided solely and exclusively under the Louisiana common law, there was no jurisdiction in the Federal Courts.

The Court of Appeals for the Fifth Circuit, in its opinion at page 4622 of the Slip Opinion, after ". . . Assuming without deciding . . ." that the District Court did not have diversity jurisdiction, held that it would assume that the District Court would have exercised its discretion to assert pendent jurisdiction, had it been aware that it was wrong on the diversity finding, and, therefore, affirmed the decision.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals for the Fifth Circuit in this case, in engaging in the assumption that

the trial Court would have exercised pendent jurisdiction, is in conflict with the decisions of this Court in *Hurn v. Oursler,* 289 U.S. 239, 77 L.Ed. 1148, 53 S.Ct. 586 and *United Mine Workers v. Gibbs,* 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130. Further, the decision of the Court of Appeals for the Fifth Circuit, on the facts of the case, that there was a substantial Federal question involved in the FELA claim upon which to base pendent jurisdiction is in conflict with the decision of this Court in *Kelley v. Southern Pacific Co.,* 419 U.S. 318, 42 L.Ed.2d 498, 95 S.Ct. 472.

ARGUMENT

In the opinion of the Court of Civil Appeals at Page 4619 of the Slip Opinion, the Court says:

> "Although the complaints adequately alleged diversity jurisdiction and the Pre-Trial Order specified both FELA and 28 U.S.C.A. § 332 jurisdiction, the non-jury proceeding focuses for the most part on the fact issues pertaining to the Defendant's FELA liability."

This is an incorrect reading of the facts of the case by the lower Court. Jurisdiction was denied and made an issue in the Pre-Trial Order. Further, we have quoted in the statement of the case the only jurisdictional allegation on diversity ever made by the Plaintiffs-Respondents. The Court entered no findings on diversity jurisdiction, but entered a Conclusion of Law that diversity jurisdiction existed.

It has been consistently held that in Order for the pleading of a Plaintiff to properly raise a question of diversity jurisdiction, he must allege the residence and domicile of the Defendant, if an individual, and the state

of incorporation and the state of the principal place of business, in the case of corporations. Failure to do so is fatally defective with respect to diversity jurisdiction. *McGovern v. American Airlines, Inc.,* 511 F.2d 653 (5th Cir. 1975), *Delome v. Union Barge Line Company,* 444 F.2d 255 (5th Cir. 1971).[1]

As the Court of Appeals pointed out in its opinion there were no facts presented by the Plaintiff at the time of trial with respect to the residence of the Defendant. Thus, diversity jurisdiction was neither pleaded nor proved. We may assume, as the Court of Appeals assumed, that the District Court did not have diversity jurisdiction. Yet the only ground in its Findings of Fact and Conclusions of Law for jurisdiction was the Conclusion of Law that diversity jurisdiction existed. There was no mention of pendent jurisdiction.

We submit that the fatal error of the Court of Appeals appears in headnote 4, at page 4621 of the Slip Opinion, where, after citing *United Mine Workers v. Gibbs, supra,* as authority it states:

> "On this state of the record, we could return the case to the District Court for an evidentiary hearing to determine whether or not the Court has diversity jurisdiction, and if not, for it to determine whether it would exercise its judicial discretion by asserting pendent jurisdiction. While there may be some doubt as to the outcome of a factual determination on diversity, *there is no reason to believe that the District Court would not assert pendent jurisdiction, it being free to do so under our foregoing analysis in this*

1. There are cases from other circuits, and this Honorable Court, too numerous to mention to the same effect and this proposition has become basic hornbook law.

> *case*. Assuming without deciding that the District Court did not have diversity jurisdiction, we treat the District Court's disposition of the case as being *equivalent* to an assertion of pendent jurisdiction, a matter well within the discretion of the trial Court. . . . Absent a full, factual jurisdictional challenge, the trial Court's exercise of discretionary jurisdiction *may be surmised* from its actions without the necessity of remand. (emphasis added)"

There is absolutely no question that the trial Court never considered pendent jurisdiction, and never exercised its discretion, when one considers that the sole ground for holding jurisdiction contained in Conclusions of Law was the erroneous finding that diversity jurisdiction existed. Yet the Court of Appeals apparently assumes that under this Court's holding in *United Mine Workers v. Gibbs, supra,* it may substitute its discretion for that of the trial Court, or, in the alternative, it may speculate on what the trial Court's discretionary action would be, in determining whether or not pendent jurisdiction exists. Without great elaboration, we submit that this is not the holding of this Honorable Court in *United Mine Workers v. Gibbs, supra.* What this Court did in that case is state that the trial Court has the power, but is not required, to exercise pendent jurisdiction. This Honorable Court said, 16 L.Ed.2d at Page 228:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of Plaintiff's right."

It is submitted that the Court of Appeals erred in assuming that the trial Court would exercise its discretion in favor of pendent jurisdiction where there is no indication in the record below of any such exercise. Assuming *arguendo* that there appeared to be a substantial Federal question involved in the FELA claim (which Petitioner denied), then the Court should have done what it stated in the above quotation that "it could have done", and that is to remand the Court to the District Court for an evidentiary determination of diversity jurisdiction and, absent diversity jurisdiction, a true exercise of discretion by the trial Court, with it stating its reasons for feeling that pendent jurisdiction existed. Instead, the Court of Appeals simply speculated on how the Trial Court would have exercised its discretion and affirmed a substantial money judgment based on that speculation.

We further submit that pendent jurisdiction would not exist in this case because there is an absence of a substantial Federal question, on the face of the record. First of all, as a reading of the Court of Appeals opinion indicates, all parties believed that the state action was barred by the statute of limitations, and it is clear that the FELA claim filed in the Federal Court was simply a last gasp attempt of the Plaintiffs to recover when they had been barred by the state law of Louisiana. All of the evidence of the case, and the Findings of Fact actually entered by the Court, clearly show that the two Plaintiffs were employees of International Paper Company, a third-party, and not employees of the railroad, and no master-servant relationship was ever alleged or proved in the case. Under the holding of this Court in *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 42 L.Ed.2d 498, 95 S.Ct. 472 (1974), as a matter of law, there never was any substance to the Federal FELA claim. It should be pointed out that the original proposed Findings of Fact and Conclusions of Law submitted by the Plaintiffs were on their FELA

claim, with no submission to the Court on their common law negligence claim. After sixteen (16) months with no action by the trial Court, and after the *Culpepper v. Daniel Industries* decision, *supra,* apparently removing the limitation bar from the common law actions, the Plaintiffs submitted new Findings of Fact and Conclusions of Law *solely* on the negligence theory and *totally abandoned* their FELA claims before decision or judgment. The Court of Appeals was in error in holding that the FELA claim was a "substantial Federal claim" when, as a matter of law, under *Kelley v. Southern Pacific Co., supra,* it did not exist as a matter of law, and further, where it appears that the Plaintiffs themselves totally abandoned the so-called Federal claim prior to judgment by withdrawing proposed Findings of Fact and Conclusions of Law on the FELA claim and substituting Findings of Fact and Conclusions of Law solely granting recovery on the common law negligence claim, which latter Findings and Conclusions were entered by the Court. Thus, we respectfully submit that the Court of Appeals erred, first, in substituting its judgment and discretion for that of the trial Court, and assuming the manner in which the trial Court would exercise its discretion if given a chance, and, second, in assuming that there was a substantial Federal question involved when it appears on the face of the record that there was none.

We further submit that there is a vital Federal question to be decided separate and apart from the facts of this case. If the decision of the Court of Appeals is allowed to stand, and its analysis of this Court's holding in *United Mine Workers v. Gibbs, supra,* is accepted, then a virtual Pandora's box of litigation in the Federal Courts, which does not belong there, could result. Following the

reasoning of the Court of Appeals, if a Plaintiff ever alleges a Federal cause of action along with a State cause of action, although he himself abandons that cause of action prior to the decisional stage, as happened in this case, and even though the lower Court holds jurisdiction upon an erroneous ground (diversity in this case), then the appellate court can say, as it did in this case, that although the lower Court held jurisdiction on an erroneous ground, had it known that the ground it was holding jurisdiction upon was erroneous, it probably would have exercised pendent jurisdiction and we will therefore affirm the decision. While we agree with the Court that *United Mine Workers v. Gibbs, supra,* did somewhat broaden the rule announced in *Hurn v. Oursler, supra,* we do not believe that this Honorable Court intended to go quite as far as the Court of Appeals' analysis of the *Gibbs* case suggests.

CONCLUSION

The United States Court of Appeals of the Fifth Circuit, based on the facts of this case and the state of the record, has misapplied the rule of the United States Supreme Court announced *United Mine Workers v. Gibbs, supra,* after a question of jurisdiction has been raised, based upon its decision that it could speculate as to what the trial Court might do if given a chance to exercise its discretion with respect to exercising pendent jurisdiction, when it is obvious that the trial Court never did exercise its discretion. The discretion to exercise, or not exercise pendent jurisdiction, assuming a substantial federal claim is involved, is a function solely of the trial Court.

The Court of Appeals further erred in holding that there was a substantial federal question involved when it appears in the face of the record that the Plaintiffs never

pled or proved a federal cause of action under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq, under the decision of this Court in *Kelley v. Southern Pacific Co., supra.* Further, it is apparent from the face of the record that the Plaintiffs themselves had abandoned their federal claim by withdrawing their original proposed findings of facts and conclusions of law and substituting new ones requesting judgment solely upon the Louisiana common law negligence claim, which findings and conclusions the Court entered.

This Honorable Court should further grant certiorari to hear a question of national significance with regard to federal jurisdiction of purely state claims on the theory of pendent jurisdiction. Was it the intention of this Honorable Court in its decision in the *United Mine Workers v. Gibbs, supra,* in cases in which alleged federal claims are either insubstantial or have been abandoned by the Plaintiffs prior to the decision and judgment, and which the federal trial Court has exercised jurisdiction upon an erroneous ground, to allow appellate courts to assume pendent jurisdiction and affirm the erroneous decision of the lower court by speculating as to what the lower court's discretionary action would be had the question of pendent jurisdiction be presented to it? If the decision of the Court of Appeals in this case is allowed to stand, almost any state claim can be tried in the federal courts simply by alleging a federal court claim, however, specious, and the appellate court may affirm simply by speculating as to what the result would have been had the question of pendent jurisdiction arisen. This Court should issue a writ of certiorari and direct that the case be reversed and rendered, or, in the alternative, be reversed and remanded to the trial Court for a determination of the true facts of

diversity jurisdiction and, in the absence of diversity jurisdiction, a true exercise of discretion by the trial Court to exercise pendent jurisdiction.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to all attorneys of record for respondents on this the _____ day of November, 1976.

_____
BRYAN J. MCGINNIS
Attorney for Petitioner

APPENDICES

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1975

No. 74-4089

D. C. Docket Nos. CA-7869 & CA-7890
(Conso. in D.C.)

CECIL MARTIN,
Plaintiff-Appellee,
versus
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Defendant-Appellant.

JERRY BRIGMON,
Plaintiff-Appellee,
versus
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Defendant-Appellant.

Appeals from the United States District Court for the
Eastern District of Texas

Before GODBOLD and RONEY, Circuit Judges, and FREEMAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 23, 1976

Issued as Mandate:

Cecil MARTIN, Plaintiff-Appellee,
v.
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Defendant-Appellant.

Jerry BRIGMON, Plaintiff-Appellee,
v.
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Defendant-Appellant.

No. 74-4089.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

July 23, 1976.

Consolidated actions, alleging causes of action under the Federal Employers' Liability Act and the Louisiana law of negligence, were brought against railroad by two individuals who sustained injuries while unloading railroad cars delivered by defendant to the Louisiana premises of plaintiffs' employer. The United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, entered judgments in favor of plaintiffs, and the railroad appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia, that although the trial proceeding focused for the most part on the fact issues pertaining to defendant railroad's FELA liability, the railroad's assertion of basic unfairness in the court's deciding the case on the negligence issue, which the railroad allegedly had no opportunity to litigate, was unavailing, since the record indicated that, before finally deciding the case, the court entered an order indicating the direction

it was taking and opening the case for any further evidence which either party wanted to bring forward, and set a hearing date four months later to allow the introduction of additional evidence; and that even assuming the District Court did not have diversity jurisdiction, the disposition of the case by the Court, which decided the case on the negligence cause of action but which also observed that the FELA claim was an "extremely close question," would be treated as being equivalent to an assertion of pendent jurisdiction, a matter well within its discretion under the facts of the case.

Affirmed.

* * *

Appeals from the United States District Court for the Eastern District of Texas.

Before GODBOLD and RONEY, Circuit Judges, and FREEMAN, District Judge.

RONEY, Circuit Judge:

The defendant railroad appeals two substantial money judgments against it for personal injuries. The appeal raises questions of subject matter jurisdiction, alleged error in awarding a verdict on the negligence cause of action, findings of fact asserted to be clearly erroneous, and excessiveness of the damages awarded to one plaintiff. We affirm.

Plaintiffs Martin and Brigmon originally filed separate actions for personal injuries they received while unloading railroad cars delivered by defendant to the premises of International Paper Company, plaintiffs' employer, in Cullen, Louisiana. The injuries were not related and did

not happen on the same day. Each complaint alleged two causes of action: one under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 *et seq.;* and one for negligence under Louisiana law. In accordance with the suggestion of all parties, the two cases which raised identical legal issues were consolidated for nonjury trial.

Without deciding the question of liability under FELA, the district court decided the case on the negligence cause of action and found that the railroad was guilty of various acts of negligence, including the failure to furnish plaintiffs with railroad cars which were free from defects. It rendered judgments for Brigmon and Martin in the sums of $87,000 and $121,791.95, respectively.

The initial issues with which we are faced concern federal court jurisdiction of the negligence claims, and the basic fairness of a decision based on negligence without a determination of the FELA claims. Although the complaints adequately alleged diversity jurisdiction and the pretrial order specified both FELA and 28 U.S.C.A. § 1332 jurisdiction, the nonjury proceeding focused for the most part on the fact issues pertaining to defendant's FELA liability. At the time of trial, all parties considered the state cause of action to be barred by the one-year Louisiana prescriptive statute. Prior to the entry of the order, however, the district court was apparently persuaded that the law of the forum, Texas, applied. *See Culpepper v. Daniel Industries,* 500 S.W.2d 958 (Tex. Civ. App. 1973). Texas has a two-year statute of limitations on negligence actions within which period these actions were brought. Defendant asserts that the plaintiffs had abandoned state negligence grounds for recovery, that almost all of the testimony presented concerns whether or not

the plaintiffs were doing such work as would bring them under the FELA, and that the defendant did not have a fair chance to defend on the negligence claims. Thus, the defendant asserts that the findings of facts and conclusions of law pitched solely on Louisiana law of negligence are clearly erroneous.

The defendant's characterization of the case as tried before the district court is largely correct. The FELA issue on which the parties focused their attention turned on whether plaintiffs were covered by the Act as non-employees of the railroad. Before finally deciding the case, however, the district court entered an order indicating the direction it was taking and opening the case for any further evidence on liability which either party wanted to bring forward. It is this order which defeats the arguments of the defendant on this appeal. The plea of limitations was "denied and overruled." Defendant was granted 30 days within which to bring in a third-party defendant. The court denied all motions as to venue and jurisdiction. The court then provided:

> It is further ORDERED by the Court that the matter in controversy having been presented heretofore and certain evidence and testimony having been presented, that it will not be necessary for the parties to present this testimony again but that the same will be considered by the Court, although the parties hereby are given permission to reopen and present additional evidence on liability, as well as damages.

[1] The court then set a hearing date four months later to allow introduction of additional evidence. At that time counsel for defendant stated it would offer no further evidence. On this record, defendant's assertion of basic

unfairness in the court's deciding a case which defendant did not have an opportunity to litigate must fail.

A careful review of the record after full briefing and oral argument discloses sufficient evidence to support the district court's findings of fact, assessment of liability, and award of damages in each case on the basis of negligence.

Two weeks prior to oral argument before this Court the defendant by supplemental brief raised a question as to the district court's jurisdiction of the negligence claim. Pursuant to permission given at oral argument, additional briefs on the jurisdictional argument have been received and studied by the Court.

[2] Defendant asserts that the failure of record proof of defendant's citizenship defeats diversity jurisdiction. To the plaintiffs' response that nevertheless the court had pendent jurisdiction to decide the negligence claim, the defendant asserts that the court purported to base its jurisdiction only on diversity and did not exercise the necessary discretion to assert pendent jurisdiction under the doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Supreme Court carefully observed in *Gibbs* that the mere existence of power to adjudicate pendent claims does not mean that the exercise of that power is wise in every instance. Defendant contends that pendent jurisdiction should not lie here because the federal statutory claim and the state law claim are separate and parallel. The case cited to support this position, *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), holds that federal courts lack pendent jurisdiction over separate and distinct nonfederal causes of action. Causes are separate and distinct where each cause seeks to remedy dis-

tinct violations. *Id.* at 245-246, 53 S.Ct. 586. In *United Mine Workers v. Gibbs, supra,* the Supreme Court expanded on the "unnecessarily grudging" rule in *Hurn,* holding that rather than focusing on causes of action to determine pendent jurisdiction, courts may entertain state as well as federal claims where both "derive from a common nucleus of operative fact." *Id.,* 383 U.S. at 725, 86 S.Ct. at 1138. *See* C. Wright, *Law of Federal Courts* § 19, at 62-65 (2d ed. 1970). This Court has described the test in terms of whether both claims share a "transactional unity." *Brunswick v. Regent,* 463 F.2d 1205, 1207 (5th Cir. 1974). It is clear that in the case before us both the state and the federal claims arise from the same set of facts.

[3] In any event, the defendant argues, the FELA claim is too insubstantial to support pendent jurisdiction. It is well established that a federal claim must be substantial before a federal court is vested with the right to assert pendent jurisdiction. *United Mine Workers v. Gibbs, supra,* 383 U.S. at 725, 86 S.Ct. 1130; *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933). In this case, however, although the district court did not decide there to be FELA liability, it observed at the conclusion of the testimony largely directed at the FELA claim that it was an "extremely close question." There is no indication that the case was insubstantial, either in actuality or in the view of the district court, in the sense that is necessary to deprive the court of jurisdiction.

Defendant is correct that we cannot determine the citizenship of the defendant railroad from the evidence in this record. There is little question, however, that the

district court would exercise its discretion in favor of pendent jurisdiction in view of the defendant's present posture as to the court's jurisdiction. No real issue was ever made in the record regarding diversity jurisdiction. In the order overruling the motions to dismiss, the court specifically asserted jurisdiction. At the hearing four months later, the defendant had an opportunity to dispute diversity jurisdiction based on its own citizenship, a fact that is peculiarly within its own knowledge. No proof contrary to the decision of the court was offered. The court was allowed to complete the case without any assertion that defendant's citizenship deprived the court of diversity jurisdiction. Not until the motions filed in this Court, after the case was docketed for oral argument and after the judges of this Court had commenced work upon the case, did the defendant assert that diversity jurisdiction had not been proven. Interestingly, the argument made to us is not that the court in fact lacked jurisdiction, no claim being made that the defendant's actual citizenship, if proved, would deprive the court of jurisdiction.

[4] On this state of the record, we could return the case to the district court for an evidentiary hearing to determine whether or not the court had diversity jurisdiction, and if not, for it to determine whether it would exercise its judicial discretion by asserting pendent jurisdiction. While there may be some doubt as to the outcome of a factual determination on diversity, there is no reason to believe that the district court would not assert pendent jurisdiction, it being free to do so under our foregoing analysis in this case. Assuming without deciding that the district court did not have diversity jurisdiction, we treat the district court's disposition of the case as being equiva-

lent to an assertion of pendent jurisdiction, a matter well within the discretion of the trial court. Although jurisdiction is a matter that can be raised at any stage of the proceedings, the attack here is not so much that there was a lack of jurisdiction but that the plaintiffs failed to make a record which discloses it. Absent a full, factual jurisdictional challenge, the trial court's exercise of discretionary jurisdiction may be surmised from its actions without the necessity of remand.

[5] The contention that the award of damages to Brigmon was excessive calls into play the clearly erroneous rule. Rule 52(a), F. R. Civ. P. In *Neal v. Saga Shipping Co., S.A.*, 407 F.2d 481, 487 (5th Cir.), *cert. denied*, 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed.2d 775 (1969), *citing Lukmanis v. United States*, 208 F.2d 260, 261 (2d Cir. 1953), this Court observed:

> "[T]he amount of damages sustained by an injured person is a question of fact . . . and upon an issue so difficult of quantitative determination, we do not interfere unless satisfied that the award is so 'plainly out of measure as to be "clearly erroneous."' . . ."

Brigmon was hit in the chin with a piece of heavy pipe. The impact knocked him straight up into the air and knocked out most of his teeth. A neurosurgeon diagnosed permanent brain injury. Headaches, neck pain and numbness in his left arm and fingers have been considerable. At the time of the injury Brigmon was 26. He was out of work for several months and suffers diminution of future earnings. The award of $87,000 is not, in our judgment, clearly erroneous.

AFFIRMED.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 7869

CECIL MARTIN,
Plaintiff

v.

LOUISIANA & ARKANSAS
RAILWAY COMPANY,
Defendant

CIVIL ACTION NO. 7890

JERRY BRIGMON,
Plaintiff

v.

LOUISIANA & ARKANSAS
RAILWAY COMPANY,
Defendant

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Attorneys for Defendant

MEMORANDUM AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above two cases were consolidated for trial since they involved similar issues of fact and law. Plaintiffs, Jerry Brigmon and Cecil Martin, who were in the general employ of International Paper Company, received personal injuries while performing their work unloading railroad cars in the Cullen Plant of International Paper Company. The railroad cars in question in both cases were placed in the plant site at Cullen, Louisiana, by the Louisiana & Arkansas Railway Company, who had received such cars from a consignor through connecting carriers, and had shipped these cars over its line and delivered them to International Paper Company as consignee. In both cases the Louisiana & Arkansas Railway Company received a tariff for the shipment and the cars in both cases were spotted pursuant to the contract of carriage by a crew of the Louisiana & Arkansas Railway Company. The injury to Jerry Brigmon occurred on March 15, 1971, and the injury to Cecil Martin occurred on May 17, 1971. Both suits were filed more than one year after the date of accident but less than two years after the date of accident. Plaintiffs in both cases alleged that the Defendant was liable under two theories. Plaintiffs claim that the railroad is liable to Plaintiffs under the Federal Employees Liability Act and secondly that the railroad is liable under common law negligence. The

Defendant denied liability under the first theory, claiming that the one year statute of limitations is a bar to the suit. The Defendant denied liability under Plaintiffs' second theory on the basis that Plaintiffs were not employees of the railroad and therefore were entitled to no relief under the Federal Employees Liability Act.

Both suits were consolidated and submitted to the Court without a jury, by consent of all parties, and the Court having considered the pleadings, the evidence, answers to interrogatories, stipulations of the parties, and the briefs filed by the respective parties, and having been fully advised in the premises, now makes and files its findings of fact and conclusions of law.

FINDINGS OF FACT

1.

On May 17, 1971, Cecil Martin, while in the general employ of International Paper Company at its plant in Springhill, Louisiana, sustained serious injuries while unloading or attempting to unload a railroad car that had been shipped into the International Paper Company mill and spotted by Louisiana & Arkansas Railway Company. The car upon which Cecil Martin was performing his work at the time of his injuries had been received by the Louisiana & Arkansas Railway Company from a consignor through connecting carriers, and the Louisiana & Arkansas Railway Company had shipped these cars over its lines to the International Paper Company plant site. Louisiana & Arkansas Railway Company received a tariff for this shipment and the cars were spotted pursuant to a contract of carriage.

2.

On March 15, 1971,. Jerry Brigmon, while in the general employ of International Paper Company at its plant in Springhill, Louisiana, sustained serious injuries while unloading or attempting to unload a railroad car that had been shipped into the International Paper Company mill and spotted by Louisiana & Arkansas Railway Company. The car upon which Jerry Brigmon was performing his work at the time of his injuries had been received by the Louisiana & Arkansas Railway Company from a consignor through connecting carriers, and the Louisiana & Arkansas Railway Company had shipped these cars over its lines to the International Paper Company plant site. Louisiana & Arkansas Railway Company received a tariff for his shipment and the cars were spotted pursuant to a contract of carriage.

3.

On May 17, 1971, Cecil Martin's work required that he operate a rotary motor type device that was hooked to a cable and connected to a heavy chain and hook. The hook was to be placed in an eye on railroad cars to pull the cars several feet in order to place them over a pit, at which point a shaker would fit into the cars and shake them, causing the chips to be unloaded from doors which opened in the bottom of the railroad cars. On this occasion Cecil Martin was in the process of connecting this heavy hook in the eye of the railroad car. The eye was properly a part of a railroad car and on this occasion the eye gave way and fell from the car, causing the hook to become disconnected from the car, which threw the weight of the hook and chain on to Cecil Martin, causing

him to lose his footing and fall. In the process, he received an injury to his back and had subsequent surgery performed to remove two ruptured intervertebral discs.

4.

On March 15, 1971, Jerry Brigmon's work required, among other things, that he open and close the doors to the bottom of the railroad cars in question. This was done by use of a ratchet or jack type device which was a part of the railroad car and which was operated by an iron pipe lever some six to eight feet in length. As Jerry Brigmon was attempting to operate this door device in order to close the door after the car had been unloaded, the teeth and jack failed to hold and the handle of the same sprung up with a great amount of force striking Mr. Brigmon in the chin, fracturing his jaw and shattering several teeth. It was determined medically and diagnosed medically that Mr. Brigmon suffered either a direct injury to the brain itself or a subdural hematoma as a result of this blow.

5.

On May 17, 1971, and at all times material hereto, the eye which gave way while Cecil Martin was performing his work, was a part of the railroad car which was spotted by Louisiana & Arkansas Railway Company as the delivering carrier.

6.

On March 15, 1971, the jack which failed to hold while Jerry Brigmon was attempting to perform his work was a part of the railroad car which was spotted by

Louisiana & Arkansas Railway Company as the delivering carrier.

7.

On May 17, 1971, and at all times material hereto, Cecil Martin was required to perform, and the parties anticipated that he or some other employee would perform, the work that he was performing on the occasion on which he was injured. Therefore, he had a legal and lawful right to be working on or near the railroad car in question.

8.

On March 15, 1971, and at all times material hereto, Jerry Brigmon was required to perform, and the parties anticipated that he or some other employee would perform, the work that he was performing on the occasion on which he was injured. Therefore, he had a legal and lawful right to be working on or near the railroad car in question.

9.

On May 17, 1971, the defective condition of the eye of the railroad car was not open and obvious, but a reasonable inspection by the railroad would have revealed said defect.

10.

On March 15, 1971, the defective condition of the jack used by Jerry Brigmon was not open and obvious, but a reasonable inspection by the railroad would have revealed said defect.

11.

At the time of his injury, Cecil Martin was in the act of unloading a railroad car which had been consigned pursuant to a contract of carriage under which the Defendant, Louisiana & Arkansas Railway Company, was the delivering carrier.

12.

At the time of his injury, Jerry Brigmon was in the act of unloading a railroad car which had been consigned pursuant to a contract of carriage under which the Defendant, Louisiana & Arkansas Railway Company, was the delivering carrier.

13.

On the occasion in question Cecil Martin was guilty of no contributory negligence.

14.

On the occasion in question Jerry Brigmon was guilty of no contributory negligence.

15.

On the occasion in question the eye hook of the railroad car used by Cecil Martin gave way by reason of its rusted condition.

16.

On the occasion in question the ratchet device which was being used by Jerry Brigmon failed to work because it had a worn out clog, which caused the handle of the ratchet to strike Jerry Brigmon.

17.

On the occasion in question Defendant, Louisiana & Arkansas Railway Company, was negligent in the following respects, which negligence was a proximate cause of the injuries and damages sustained by Cecil Martin:

(a) In failing to furnish a railroad car reasonably free of defect;

(b) In failing to make a reasonable inspection of the car and its equipment and appliances;

(c) In failing to furnish those unloading the car a reasonably safe car or reasonably safe place in which to perform the work;

(d) In furnishing a car in a dangerous condition;

(e) In failing to warn of the defective condition of the car.

18.

On the occasion in question Defendant, Louisiana & Arkansas Railway Company, was negligent in the following respect, which negligence was a proximate cause of the injuries and damages sustained by Jerry Brigmon:

(a) In failing to furnish a railroad car reasonably free of defect;

(b) In failing to make a reasonable inspection of the car and its equipment and appliances;

(c) In failing to furnish those unloading the car a reasonably safe car or reasonably safe place in which to perform the work;

(d) In furnishing a car in a dangerous condition;

(e) In failing to warn of the defective condition of the car.

19.

Cecil Martin, who was 36 years of age at the time of his injury, was born on May 15, 1935. Prior to his injury he was a strong and healthy man. His health was perfect. He has a high school education and his only work experience is that of a common laborer. At the time of his injury he was making $3.50 per hour but there have been subsequent raises so that his earnings at the time of trial would be $4.70 per hour. He underwent disc surgery on his low back, wherein two intervertebral discs were removed. His surgery was not successful in that it has not relieved the symptoms of pain and discomfort. Cecil Martin has been unable to work since the date of his injury. Cecil Martin, as a result of the injury in question, has sustained a loss of earnings in the past and has suffered a loss of earning capacity in the future. He has suffered conscious pain and suffering and mental anguish in the past and will continue to suffer conscious pain and suffering and mental anguish in the future. The medical expenses necessarily and reasonably incurred by Cecil Martin by reason of his injuries are as follows:

Dr. Burke	$755.00
Doctors Hospital of Shreveport, Louisiana	876.95
Dr. Koenig	160.00

20.

As a result of the injuries received by Cecil Martin on May 17, 1971, and by reason of loss of earnings in the

past, loss of earning capacity in the future, the conscious pain and suffering and mental anguish suffered in the past, and the conscious pain and suffering and mental anguish which Cecil Martin will suffer in the future, he has been damaged in the amount of One Hundred Twenty-One Thousand Seven Hundred Ninety-One and 95/100 ($121,791.95) Dollars.

21.

Jerry Brigmon, who was born on January 24, 1945, was 26 years of age at the time of his injury. He sustained a concussion, injury to the neck and injury to the brain. His injury is permanent. Jerry Brigmon has been treated by doctors since his injury. For the three months following his injury he made approximately Nine Hundred and No/100 ($900.00) Dollars per month. However, because of the injury he was forced to cease working and he has not been able to work since that time. His hourly wage at the time of injury was $3.75 per hour but the same job at the time of trial paid $5.75 per hour. Jerry Brigmon was a strong, able-bodied male prior to his injury and was in good health. As a result of the injury Jerry Brigmon has suffered conscious pain and suffering and mental anguish in the past, and will continue to suffer conscious pain and suffering and mental anguish in the future. He has suffered a loss of earnings in the past and will suffer a loss of future wage-earning capacity.

22.

As a result of the injuries received by Jerry Brigmon on March 15, 1971, and by reason of the loss of earnings in the past, loss of earning capacity in the future, the conscious pain and suffering and mental anguish suf-

fered in the past, and the conscious pain and suffering and mental anguish which Jerry Brigmon will suffer in the future, he has been damaged in the amount of Eighty-Seven Thousand and No/100 ($87,000.00) Dollars.

CONCLUSIONS OF LAW

1.

At all times material to both lawsuits, Jerry Brigmon and Cecil Martin were involved in the unloading of railroad cars that had been transported by Louisiana Arkansas Railway Company over its lines, and delivered and spotted by the Louisiana & Arkansas Railway Company as delivering carrier. In each case the Louisiana & Arkansas Railway Company received a tariff for the shipment and the cars were transported pursuant to consignment.

2.

The duties of Cecil Martin and Jerry Brigmon required them to work on and about the railroad cars and equipment and appliances of the railroad cars, and they were rightfully and legally working on and about said railroad cars. Thus, the railroad owed a duty to Cecil Martin and to Jerry Brigmon to exercise ordinary care to furnish a car that was reasonably safe and reasonably free from defect.

3.

The cause of action of Jerry Brigmon and Cecil Martin against Louisiana & Arkansas Railway Company is gov-

erned by the two-year statute of limitation. Therefore, these suits are not barred by limitation.

4.

This Court has jurisdiction by reason of the fact that there is diversity of citizenship, and the amount in controversy exceeds $10,000.00.

5.

The defective conditions of the railroad cars was not open and obvious.

6.

The Court, by reason of its decision herein, does not reach the question of Plaintiffs' rights to recover under the Federal Employees Liability Act, and Plaintiffs' rights in this regard, if any, are not decided herein. The same are unnecessary by reason of the Court's decision.

7.

Defendant, Louisiana & Arkansas Railway Company, was guilty of negligence, which negligence was a proximate cause of the injuries sustained by Plaintiffs, as follows:

(a) In failing to furnish a railroad car reasonably free of defect;

(b) In failing to make a reasonable inspection of the car and its equipment and appliances;

(c) In failing to furnish those unloading the car a reasonably safe car or reasonably safe place in which to perform the work;

(d) In furnishing a car in a dangerous condition;

(e) In failing to warn of the defective condition of the car.

8.

Plaintiff, Cecil Martin, is entitled to damages from the Defendant, Louisiana & Arkansas Railway Company, in the sum of One Hundred Twenty-one Thousand Seven Hundred Ninety-one and 95/100 ($121,791.95) Dollars.

9.

Plaintiff, Jerry Brigmon, is entitled to damages from the Defendant, Louisiana & Arkansas Railway Company, in the sum of Eighty-seven Thousand and No/100 ($87,000.00) Dollars.

The allowable costs are taxed against Defendant, Louisiana & Arkansas Railway Company.

DATED this 22nd day of October, 1974.

/s/ JOE J. FISHER
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 7869

CECIL MARTIN,
Plaintiff

v.

LOUISIANA & ARKANSAS
RAILWAY COMPANY,
Defendant

JUDGMENT

This action came on for trial before the Court, the parties thereto having consented to try all matters before the Court without a jury, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that Plaintiff, Cecil Martin, recover of the Defendant, Louisiana & Arkansas Railway Company, the sum of One Hundred Twenty-one Thousand Seven Hundred Ninety-one and 95/100 ($121,791.95) Dollars, with interest thereon at the rate of six (6%) per cent per annum from date of entry of this Judgment as provided by law, with costs of court to be paid by Defendant.

ENTERED this 22nd day of October, 1974.

/s/ JOE J. FISHER
United States District Judge

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 24, 1976

TO ALL COUNSEL OF RECORD

No. 74-4089 - Cecil Martin vs. La. & Ark. Railway Co.
**Jerry Brigmon vs. La. & Ark. Railway Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Bryan J. McGinnis
Mr. Scott Baldwin
Mr. Gilbert I. Low

IN THE

Supreme Court of the United States

NO. 76-738

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

CECIL MARTIN,
Respondent

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

JERRY BRIGMON,
Respondent

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

SCOTT BALDWIN
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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW

The question here presented is whether the Fifth Circuit Court of Appeals properly applied the holding of this Court in *United Mine Workers v. Gibbs.*[1]

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1. *United Mine Workers v. Gibbs,* 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130.

STATEMENT OF THE CASE

The statement of the case made by the Petitioner is largely correct with the exceptions hereinafter noted. Suit was filed originally for the two Plaintiffs alleging two causes of action: one under the Federal Employers' Liability Act and one for negligence under the Louisiana law. Jurisdiction was denied by the Defendant generally. The Court found specifically that it had jurisdiction and it found in favor of both Plaintiffs.

At no time did the Defendant call to the attention of the Trial Court its claim that the Court lacked jurisdiction. Rather this claim was made for the first time, when the case was on appeal, some three and one-half years after the original complaint was filed and only two weeks before the case was set for oral argument in the Court of Civil Appeals.

The Court of Civil Appeals held that whether or not there was diversity jurisdiction the Trial Court most certainly had pendent jurisdiction under the dictates of *United Mine Workers v. Gibbs.*[2]

THE OPINION BELOW

The opinion of the Court of Civil Appeals is reproduced as Appendix A-5 of Petitioner's Brief. It correctly applied the rule announced by this Court in *Gibbs*[3] that where two causes of action are alleged, one under the Federal law and one under state law, a Federal court has pendent jurisdiction to try the entire case. This is true even though the Federal cause of action may fail,

2. *Ibid.*

3. *Ibid.*

leaving for determination only the state cause of action over which the Court would not have had jurisdiction had it been brought separately.

ARGUMENT AND AUTHORITIES

This case fits squarely within the *Gibbs* rule and the Court of Appeals was imminently correct in affirming the action of the Trial Court.

As stated, the Plaintiffs alleged alternative courses of action under the Federal Employers' Liability Act and the law of Louisiana. The main thrust of the Plaintiffs' case was in connection with the FELA cause of action. While the case was under advisement and before decision, the case of *Culpepper v. Daniel Industries*[4] was brought to the attention of the Court. This meant that the Texas two year statute of limitation would apply, in place of the Louisiana one year statute, and that the Plaintiffs' cause of action for negligence under the Louisiana law was viable. With these developments, the Trial Court ordered a hearing of the parties. As a result of this hearing, the Trial Court issued an order wherein it found that it had jurisdiction and it gave the parties permission to reopen and present additional evidence on all matters. It provided further that it would be necessary to present evidence already presented and that the same would be considered by the Court. The hearing date to allow additional evidence was set four months in advance. The Defendant offered no further proof.

The Plaintiffs at no time abandoned their FELA claim nor did they ever withdraw their proposed Findings of

4. *Culpepper v. Daniel Industries,* 500 S.W.2d 958 (Tex. Civ. App. 1973).

Fact in regard thereto. The Court found for the Plaintiffs on their negligence claim but specifically stated that it was not deciding the FELA issues because its disposition of the negligence claim made it unnecessary to do so.

THE DIVERSITY ISSUE

It is submitted that the action of the Trial Court in finding that it had jurisdiction is justified under either diversity jurisdiction or pendent jurisdiction.

The Supreme Court has stated that it was the intention of Congress to "leave the mode of raising and trying such issues (as jurisdiction) to the discretion of the trial judge."[5] Here the Court made a specific finding that jurisdiction exists.

The most the Defendant ever did to challenge jurisdiction was to make a general denial of the allegation. It is firmly established that after jurisdiction is challenged the Plaintiff must have an opportunity to present facts by affidavit, or by deposition, or in an evidentiary hearing in support of its jurisdiction contention.[6] In spite of this the Defendant at no time during the trial stage advised the Court or opposing counsel, except by general denial, that the diversity jurisdiction of the Court was being challenged. The Trial Court therefore had no opportunity or reason to conduct a full-fledged hearing on diversity.

It is significant to note that the Defendant does not assert that from the record the Court *lacks* jurisdiction.

5. *McNutt v. G.M.A.C.*, 298 U.S. 178, 80 L.Ed. 1135.

6. *Local 336, American Federation of Musicians AFL-CIO v. Bonatz*, (3rd Cir. 1973), 475 F.2d 433; *Groh v. Brooks*, 421 F.2d 589 (3rd Cir. 1970); *Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3rd Cir. 1964).

Rather, it asserts that it has not been proved. The residence of the Defendant is peculiarly within the knowledge of the Defendant. Why it waited until shortly before the case was to be submitted to the Court of Civil Appeals to raise this question is known only to the Defendant. One is left only to speculate as to whether the Defendant can in fact refute the allegations and findings of diversity or whether in truth and in fact it wants a new trial with the hope of better results.

PENDENT JURISDICTION

In any event, it is clearly established that the Trial Court had pendent jurisdiction. The rule in *Gibbs* is simply: where a cause of action embraces two claims, one a common law or state claim, and the other a Federal claim, arising from the same operative facts, the Trial Court could and should dispose of both claims in the same course of action.[7]

The facts in the case at bar essentially are the same as Gibbs. In *Gibbs* there was a claim under a Federal statute (secondary boycott) and a state claim under the law of Tennessee for interference with the employment relationship with the plaintiff. In fact, the Federal claim failed, but nevertheless the Court held that the Trial Court had jurisdiction to determine the state court claim because they both arose from the same operative set of facts. The Defendant here does not question the holding of the Court of Civil Appeals that both causes of action arise from the same nucleus of operative fact.

7. *Supra*, fn. 1, p. 228; and see *Beverly Hills National Bank & Trust Co. v. Compania De Nav. Almirante*, 437 F.2d 301 (9th Cir. 1971).

SUBSTANTIVE FEDERAL CLAIM

Finally the Defendant argues the Plaintiffs' Federal claim is not substantial as required by *Gibbs*. The question of whether or not a substantive Federal claim exists is to be determined from the pleadings.[8]

The test of whether a claim is "substantial" is the same as that applied in determining whether a claim should be dismissed for want of jurisdiction rather than on its merits.[9] In such determination the allegations of the Plaintiffs' Complaint must be taken as true.[10]

In the case at bar a substantial portion of the proof was in connection with the FELA claim.[11] The Trial Court recognized that it was a "close question" whether the Plaintiff should prevail on the FELA claim. Significantly the Trial Court found that it was not deciding the FELA claim as there was no need to because of its disposition of the state claim.

The pleadings and the record leave no other conclusion but that the Federal claim was "substantive".

JURISDICTION WILL BE FOUND WHERE IT CAN BE SUPPORTED ON ANY BASIS

The Supreme Court has firmly established the rule that where a case is tried in the Federal courts and juris-

8. *Supra*, fn. 1, p. 229; *Tully v. Mott Supermarkets, Inc.*, (D.C. NJ 1972), 337 F.Supp. 834.

9. *A. H. Emery Co. v. Marcan Products Corp.*, (C.A. 2d 1968), 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

10. *Lasher v. Shafer*, 460 F.2d 343 (1972, 3rd Cir.).

11. Some 69 pages of the Record were devoted to proof and briefs in support of Plaintiffs' FELA claim.

diction is raised for the first time on appeal the question IS NOT whether the Court properly asserted or acquired jurisdiction, but rather whether jurisdiction existed at the time it entered judgment.[12] *Grubbs* was a removal case and jurisdiction was raised for the first time on appeal *sua sponte* by the Appellate Court. Reversing the holding of the Court of Appeals that there was no Federal jurisdiction, the Supreme Court held that whether or not the case was properly removed the District Court had jurisdiction when the suit was filed and therefore jurisdiction existed.[13]

It is clear from this holding that the Supreme Court has adopted the view that when a case is tried in the Federal Courts, jurisdiction will be found where it can be supported on any basis. This is true regardless of how the Federal Court acquired jurisdiction. Certainly the case at bar comes within this rule as the Trial Court had jurisdiction by virtue of the FELA claim irrespective of the diversity issue.

12. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L.Ed. 612, 92 S.Ct. 1344.

13. *Ibid.*

CONCLUSION

It is submitted that the Court of Civil Appeals correctly applied the *Gibbs* rule to this case.

Respectfully submitted,

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Beaumont, Texas 77701

By: _____
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondents in Opposition was mailed, postage prepaid, properly addressed, to Mr. Bryan J. McGinnis, 1400 San Jacinto Building, Beaumont, Texas 77701, attorney for Petitioner, on this the ____ day of December, 1976.

_____
Of Counsel